Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1146

EDUARDO POETA,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PATRICK M. WALL
36 West 44th Street
New York, N. Y. 10036
(212) 986-6688
Counsel for Petitioner

INDEX

	PAGE
Petition for a Writ of Certiorari	1
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statement of the Case	3
Reasons for Granting the Writ	4
Conclusion	10
Appendix	
Opinion of the United States Court of Appeals	A1
Order of Affirmance of the United States Court of Appeals	A12

Authorities Cited

Cases

Alderman v. United States, 394 U.S. 165 (1968)	10
Berger v. New York, 388 U.S. 41 (1967)	7, 8
Cox v. United States (10th Cir. October 21, 1971)	9
Hancock v. White, 378 F.2d 479 (1st Cir. 1967)	6
Massiah v. United States, 377 U.S. 201 (1964)	5, 6, 7

PAGE

State v. McLeod, 173 Ohio St. 520, 184 N.E.2d 101 (1962), cert. granted and case remanded, 378 U.S. 582, decision adhered to, 1 Ohio St. 2d 60, 203 N.E.2d 349 (1964); rev'd, 381 U.S. 356 (1965) ... 5

United States v. Beatty, 377 F.2d 181 (5th Cir.) rev'd, 389 U.S. 45 (1967) ... 5, 6

United States v. Edwards, 366 F.2d 853 (2d Cir. 1966) ... 7

Statutes

18 U.S.C. §§2510 et seq. ... 2, 7

18 U.S.C. §2518(5) ... 2, 8, 9

21 U.S.C. §§173 and 174 ... 1, 3

28 U.S.C. §1254(1) ... 2

18 U.S.C. §2518(3)(c) ... 7

18 U.S.C. §2518(4)(e) ... 8

United States Constitution

Sixth Amendment ... 5, 7

IN THE

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No.

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Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Eduardo Poeta, prays that a writ of certiorari be issued to review a judgment of the United States Court of Appeals for the Second Circuit, affirming a judgment of the United States District Court for the Eastern District of New York, dated March 19, 1971, convicting him of fourteen counts of illegally importing and distributing heroin in violation of 21 U.S.C. §§173 and 174, and one count of conspiracy to do so.

Opinion Below

The opinion of the United States Court of Appeals for the Second Circuit, not yet officially reported, is reprinted herein as an Appendix.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on January 24, 1972. By order dated February 26, 1972, this Court extended the time within which this petition had to be filed until March 8, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Whether Petitioner's right to counsel was violated by the wiretap interception of incriminating conversations after indictment but before arraignment.

2. Whether Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. §§2510 et seq.) permits a wiretap authorized by it to be continued after the indictment of the persons whose conversations are sought to be overheard.

3. Whether the renewal of a wiretap order, pursuant to 18 U.S.C. §2518(5), may validly be based solely upon the same factual showing upon which the order to be renewed had been based.

4. Whether, when the authorities conducting a wiretap violate 18 U.S.C. §2518(5) by failing to minimize the quantity of material intercepted, one whose conversations were thus overheard but who was not the party upon whose telephone the wiretap was placed has standing to raise this issue.

Statement of the Case

Petitioner and one Luis Stepenberg were convicted, after jury trial in the United States District Court for the Eastern District of New York, of fourteen counts of illegal importation and distribution of heroin (21 U.S.C. §§173 and 174) and one count of conspiracy to do so. Stepenberg died before sentence; Petitioner was sentenced to forty years in prison.

Insofar as it may be pertinent here, the evidence introduced by the Government may be briefly summarized as follows:

In December of 1968, one Jaime Cohen (the chief Government witness) agreed to help Stepenberg and one Jacobo Grodntzsky import and distribute heroin in the United States. A house rented by Cohen in New York served as a distribution point for the heroin. On seven occasions between June, 1969 and February, 1970, varying quantities of heroin were delivered to that house. Petitioner would inform Cohen of their arrival and the latter would immediately retrieve the contraband, sell it, and give Petitioner the proceeds.

In February of 1970, Cohen was arrested and shortly thereafter began to cooperate with state and federal law enforcement officials. With his consent, a wiretap was placed upon his own phone. Later, by authority of an order issued by a New York State Supreme Court Justice, a wiretap was placed upon the telephone of Stepenberg. This petition revolves around the Stepenberg wiretap, which eventually produced three highly incriminating conversations between Petitioner and Stepenberg, all of which were introduced at trial, along with other evidence.

The first order authorizing a Stepenberg tap was signed on April 22, 1970, and was amended (solely as to the location and identity of the phone) on May 7. Thereafter, renewal orders were signed on May 21, June 19 and July 20. The incriminating conversations were seized on July 10 and 11, under authority of the June 19 renewal order.

There are two facts which have a bearing on the validity of that June 19 order and on the legality of the interceptions of July 10 and 11. First, the conversations were seized more than a week after both Petitioner and Stepenberg had been indicted; the indictment was sealed, however, and neither had been arraigned upon it. Second, the application for the June 19 order contained not a single fact which had not been contained in the application for the previous order of May 21; indeed, to a large extent, that prior application was merely incorporated by reference in the application for the June 19 order.

Reasons for Granting the Writ

1. The order which purportedly justified the interceptions of Petitioner's phone conversations with Stepenberg in early July was signed on June 19. About a week before those conversations were intercepted, both Petitioner and Stepenberg were indicted by a federal grand jury for the very crimes which the wiretap had been calculated to establish—a fact clearly known to those manning the tap. The indictment was sealed, and the bench warrants which were issued for the arrest of the accused were not sought to be executed until after the intercepted conversations which took place on July 10 and 11. These facts clearly raise the issue as to whether law enforcement officials may, consistent

with the Sixth Amendment, eavesdrop upon the conversations of those already under indictment.

That a serious constitutional question is involved is shown by this Court's reasoning in *Massiah* v. *United States*, 377 U.S. 201 (1964), and its application of that reasoning in *McLeod* v. *Ohio*, 381 U.S. 356 (1965) and in *Beatty* v. *United States*, 389 U.S. 45 (1967).

In *Massiah*, the Sixth Amendment was held to have been violated when, after Massiah had been indicted and had retained counsel, Government agents surreptitiously obtained incriminating statements from him through a co-defendant who, unknown to Massiah, had agreed to cooperate with the Government. It is true, of course, that, in *Massiah*, counsel had already been retained and statements were elicited by a Government agent.

In *McLeod*, the defendant had voluntarily made incriminating statements to law enforcement agents after indictment but before arraignment and the retaining or appointment of counsel. He was not interrogated by those agents, nor was any deception practiced upon him. The statements were admitted against him over objection, and he was convicted. His appeal as of right was summarily dismissed by the Ohio appellate court on the ground that no debatable constitutional question was presented. See *State* v. *McLeod*, 173 Ohio St. 520, 184 N.E.2d 101 (1962). This Court granted certiorari and remanded the case for reconsideration in light of *Massiah*. See *McLeod* v. *Ohio*, 378 U.S. 582 (1964). On remand, the Supreme Court of Ohio affirmed, noting the above-mentioned differences between *Massiah* and the case then before it. See *Ohio* v. *McLeod*, 1 Ohio St. 2d 60, 203 N.E.2d 349 (1964). This Court, on authority

of *Massiah*, summarily reversed. Thus, *Massiah* was held applicable to a case where the defendant had been indicted but had not yet been arraigned, and had made voluntary statements in the absence of interrogation and deception. We submit that the instant case is far stronger for the application of *Massiah*. See, for a similar case, *Hancock* v. *White*, 378 F. 2d 479 (1st Cir. 1967) (statements voluntarily made to law enforcement officers after indictment but before arraignment excluded under the *Massiah* doctrine).

In *Beatty*, the Fifth Circuit, after "a very careful study of the *Massiah* opinion," was "convinced" that the *Massiah* doctrine did not apply to the case before it, since in *Massiah*, a Governmental agent had induced the defendant to speak, whereas in *Beatty*, the defendant had volunteered his remarks. See 377 F.2d 181 (5th Cir. 1967). This distinction was obviously held unimportant by this Court, which granted certiorari and, without further argument, reversed on *Massiah* grounds.

Government trial counsel conceded that all wiretapping of the defendants would have to have been terminated if the defendants, after indictment, had been arraigned and had retained counsel. Here, however, it was the Government itself which delayed execution of the bench warrants which were issued when the indictment was filed. A defendant's right to counsel and his enjoyment of the benefits which flow from that right should not depend on the Government's wishes.

We respectfully submit that, by its decisions in *Massiah*, *McLeod* and *Beatty*, this Court has made it unmistakably clear that the Government may not eavesdrop on one who has already been indicted, and that the court below failed to apply the doctrine of those cases.

In rejecting the argument made here, the Second Circuit relied upon both *Massiah* and upon *United States* v. *Edwards*, 366 F.2d 853, 873 (2d Cir. 1966). *Massiah*, it is true, affirms the Government's right to continue investigating one under indictment, but places limitations upon that right—limitations mandated by the Constitution and consonant with the limitations Petitioner now seeks here. And *Edwards* holds no more than *Massiah*.

In short, we suggest that this petition squarely presents a Sixth Amendment question with enough novelty and urgency to merit this Court's attention.

2. The second question raised by this petition is also based upon the fact that the wiretap continued after indictment. Here, however, the question is whether such continued electronic surveillance is permitted by the statute rather than by the Constitution.

Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. §§2510 et seq.) was drafted in a serious effort to comply with the principles laid down by this Court in *Berger* v. *New York*, 388 U.S. 41 (1967). Anyone with the acumen sufficient to understand the legislative history of that Title (the first such wiretap law approved by a Congress persistently opportuned for thirty years to pass such a law) knows that it was passed because of its meticulously drafted restrictions and limitations. The entire tenor of the terms shows that wiretapping received the blessing of Congress only when it constituted a necessity, and, even then, only to the minimal extent necessary.[1] And

[1] Thus, for example, a judge may not approve a wiretap unless he makes a finding, required by 18 U.S.C. §2518(3)(c), that "normal investigative procedures have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous."

even when a court makes the required finding of necessity, the order issued must contain additional restrictions upon those who do the tapping.[2]

In the instant case, the wiretap was continued after both Petitioner and Stepenberg had been indicted.[3] We submit that had the issuing judge been told, as he should have been, that the subjects of the tap had been indicted, he would have ordered the tap to cease, since it was no longer necessary.

In light of the legislative history of Title III and its emphasis upon the theory that wiretapping is proper only when necessary, we submit that there is a serious question whether Congress meant it to permit wirtapping after indictment. Only this Court can finally resolve that question.

3. The wiretap order pursuant to which Petitioner's incriminating conversations were overheard was issued on June 19, 1970 and was based upon an application virtually identical to that upon which the order of May 21 had been based. Not a single fact was presented to the judge who issued the June 19 order which had not been presented to him a month before.

In *Berger* v. *New York*, 388 U.S. 41, 59 (1967), this Court stated that:

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[2] See, e.g., 18 U.S.C. §2518(4)(e) and (5).

[3] Indeed, the application for a further renewal of the wiretap, filed more than two weeks after that indictment, made no reference to it. The printed form of the application had a space for the inclusion of "results thus far obtained from the interception." The application merely stated, in that space, that "information has been intercepted which has resulted in the indictments concerning the traffic and sale of narcotics as reflected in the affidavit of Det. Douglas Reid . . . ." That affidavit mentioned certain indictments handed down in May, but made no reference to the July 2 indictment of Petitioner.

> Apparently the original grounds on which the eavesdrop order was initially issued also form the basis of the renewal. This we believe insufficient without a showing of present probable cause for the continuation of the eavesdrop.

Thus, this petition raises the important question whether "present" probable cause for a wiretap renewal may be shown solely by the same facts upon which the prior order was based. See, e.g., the recently-decided case of *Cox* v. *United States* (10th Cir. October 21, 1971), where the court stated that what was required on a renewal was "new findings sufficient to uphold an original authorization."

4. Despite the provision of 18 U.S.C. §2518(5)[4] and the provisions of the orders authorizing the wiretaps on the Stepenberg telephone, no effort whatsoever was made by those who conducted the tap to minimize the interception of conversations not covered by the orders. The record establishes that: (a) two or three people were required to bring the transcripts of the three-month Stepenberg tap into the courtroom; (b) fully three-quarters of the taped conversations were not pertinent; and (c) the tap was maintained twenty-four hours a day during its entire existence, with police under instructions to record by tape each and every conversation. Thus, not even lip service was paid to the minimization requirement.

In rejecting Petitioner's argument that the wiretaps should have been suppressed on this ground, the Court of

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[4] The last sentence of that section provides in part that:

> Every order . . . shall contain a provision that the authorization to intercept . . . shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter . . . .

This provision was based, we submit, upon the guidelines which this Court laid down in *Berger, supra.*

Appeals, citing *Alderman* v. *United States*, 394 U.S. 165 (1968), merely stated that he had no standing to raise the issue, since the tap was not on his own phone but on that of Stepenberg.

We respectfully submit that the court below misread *Alderman*, for in that case this Court stated, at page 176, that:

> any petitioner would be entitled to the suppression of government evidence originating in electronic surveillance violative of his own Fourth Amendment right to be free of unreasonable searches and seizures. *Such violation would occur if the United States unlawfully overheard conversations of a petitioner himself* . . . . (Emphasis added)

This Court rejected the concept that one lacked standing whenever his conversations were illegally overheard on someone else's premises, and the analogy between that concept and the one espoused by the court below is obvious.

This Court should correct the Second Circuit's error on such an important issue, lest it be followed elsewhere.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

PATRICK M. WALL
36 West 44th Street
New York, N. Y. 10036
(212) 986-6688
Counsel for Petitioner

Appendix—Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 322—September Term, 1971.

(Argued December 1, 1971 Decided January 24, 1972.)

Docket No. 71-1682

UNITED STATES OF AMERICA,

Appellee,

v.

EDUARDO POETA,

Appellant.

Before:

LUMBARD, WATERMAN and FEINBERG,

Circuit Judges.

Appeal from a judgment of conviction for 14 counts of illegally importing and distributing heroin in violation of 18 U.S.C. §§ 173 and 174 and one count of conspiracy to do so, in the Eastern District of New York, Mishler, *J.*, and a jury.

Affirmed.

EDWARD R. KORMAN and RAYMOND J. DEARIE, Assistant United States Attorneys (Robert A. Morse, United States Attorney for the Eastern District of New York and David G. Trager, Assistant United States Attorney, on the brief), *for Appellee.*

PATRICK M. WALL, New York, New York, *for Appellant.*

LUMBARD, *Circuit Judge:*

Eduardo Poeta, found to be a central participant in an international heroin smuggling operation, appeals from a judgment of March 19, 1971 in the Eastern District sentencing him to imprisonment for 40 years and fines totalling $300,000,[1] following his conviction by a jury on 14 counts of illegally importing and distributing heroin in the United States, 21 U.S.C. §§ 172 and 174, and one count of conspiring to do so.

Poeta's only claims of error relate to the admission of two conversations intercepted on July 10 and 11, 1970 over the telephone of his co-defendant Luis Stepenberg[2] on the grounds that the judge's order authorizing the tap was invalid, that the conversations intercepted were seized more than a week after Poeta and Stepenberg had been indicted and constituted an infringement of Poeta's right to counsel, that the government failed to minimize the extent of its wiretapping in violation of 18 U.S.C. § 2518(5), and that the recordings of the intercepted conversations were not made available to the court issuing the order within the time required by the governing federal statute. We find no error in the admission of this evidence and, accordingly, the conviction is affirmed.

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[1] Poeta was convicted on one count (15) of conspiracy and 14 substantive counts (1-14). He was sentenced to a term of imprisonment of 20 years on Counts 1, 3, 5, 7, 9, 11 and 13, sentences to run concurrently, and 20 years on Counts 2, 4, 6, 8, 10, 12, 14 and 15, sentences to run concurrently, and fined $20,000 on each count.

[2] Luis Stepenberg was also tried with Poeta and convicted, but died before sentencing.

Entirely apart from the wiretap conversations, the evidence against Poeta, who did not testify in his own behalf,[3] was overwhelming. The government's case was built principally on the testimony of two witnesses: Jaime Cohen, a confederate of Poeta and Stepenberg, who had assisted them for two years in selling the heroin which they imported, and Felix Martinez, who had purchased large quantities of heroin from Cohen and Poeta on numerous occasions. In addition, federal and state narcotics agents had observed and filmed many of the meetings between the co-conspirators and so testified.

The evidence showed that the scheme began when, following instructions given by Stepenberg at a meeting in Rio de Janeiro, Brazil in December 1968, Cohen rented a house on Dartmouth Street in Forest Hills, New York. The Dartmouth Street house was used as a distribution point for the smuggled heroin. On fourteen different occasions between June 1969 and February 1970, Poeta and his co-conspirators Stepenberg and Jacobo Grodntzsky[4] smuggled quantities of heroin, ranging from one to ten kilos, into the country and to the Dartmouth Street house. When the heroin arrived at Dartmouth Street, Poeta would contact Cohen telling him that the heroin was there and giving the precise location of its hiding place. Poeta instructed Cohen to go to the house on at least seven different occasions. After retrieving the heroin, Cohen would contact a purchaser, deliver the heroin in quantities ranging from one to ten kilos, and collect payment in cash which he would deliver immediately to Poeta. By February 1970, Cohen

[3] Nor did Stepenberg.

[4] Grodntzsky is presently a fugitive from justice.

had sold approximately 20½ kilos of heroin, at $13,500 per kilo or $8,000 for half a kilo, for an approximate total of $293,000.

Cohen was arrested in February 1970 and 8½ kilos were recovered in an apartment at 42-25 80th Street, Queens, New York, which Cohen rented. After a few days in jail where he was held, unable to post $250,000 bail, he agreed to cooperate with state and federal authorities. Released on bail of $15,000, Cohen resumed his operations with Poeta and Stepenberg, but kept the authorities informed of their activities and consented to electronic surveillance of his telephone and his apartment at 92-28 57th Street, Queens, New York, where he resided.

Wiretap surveillance was begun on March 19, 1970, when the District Attorney of Queens County obtained an order from New York Supreme Court Justice Leahy which authorized a wiretap on Cohen's telephone 592-5459 at the Forest Hill house.[5] No objection is made to this order nor the four subsequent orders of April 17, May 15, May 28 and June 15 which authorized continued tapping, as Cohen had consented to all these taps.

Relying on information received from these taps, the District Attorney, on April 22, 1970, obtained an order from Justice Schweitzer of the New York Supreme Court which authorized the New York City Police Department to wiretap the telephone of Luis Stepenberg's father at 711

[5] The New York State eavesdropping statute, New York Crim. Proc. L. art. 700, was enacted in 1969 with the intention that it conform to the federal statute, 18 U.S.C. § 2510 *et seq.*, which had been enacted the previous year. As enacted, the New York statute replaced the previous law which had been held invalid by the Supreme Court in *Berger* v. *New York*, 388 U.S. 41 (1967).

West End Avenue in Manhattan, 866-2971, on the allegation that Luis Stepenberg generally used that telephone.

The affidavit of Detective Reid in support of the District Attorney's application for the April 22 order referred in detail to four conversations which had been heard over the tap on Cohen's telephone: On March 19, using Cohen's telephone Felix Martinez had called one Isabel Benitz and told her to deliver one-half kilo of cocaine to him at a certain place; on March 20, Cohen had called Martinez and they talked about the delivery of cocaine arranged the day before; on April 11, Cohen had called Luis Stepenberg who spoke about paying Cohen both for his participation in a prior narcotics sale and for his attorney's fee incurred as a result of his February arrest which had uncovered 8½ kilos of heroin and led to his cooperation with the police; and finally, on April 11, Martinez and Cohen had spoken regarding the receipt and quality of one kilo of cocaine delivered to Cohen by Isabel Benitz.

On May 7, Justice Schweitzer amended his order of April 22 to permit the tapping of the telephone, 787-1624, which Stepenberg recently had installed in his own apartment at 155 West 68th Street, Manhattan. On May 21, 1970 Judge Schweitzer reauthorized the tapping of this telephone on the further application of the District Attorney, supported by an affidavit of Detective Reid which related to a conversation intercepted on May 16, 1970 between Poeta and Stepenberg concerning a shipment of narcotics from Argentina.

On June 19 the District Attorney secured a further authorization of the wiretap order and it was under this

order that the July 10 and 11 Poeta-Stepenberg conversations were intercepted.

In the July 10 conversation, Poeta told Stepenberg to "desist" from further operations as he had spotted a tail; in the July 11 conversation, Poeta talks of a day at the races, apparently code language regarding a shipment of heroin. Nevertheless Poeta now contends that the June 19 wiretap, and hence the July 10 and 11 seizures made under it, were invalid and that his conviction must be reversed. He advances two arguments: first, that the June 19 order was invalid since it was granted largely on the basis of a conversation illegally intercepted on May 16; and, second, that the June 19 order was invalid because there was no new showing of probable cause in the application for it.

Our examination of the record order convinces us that the seizure of the May 16 conversation was authorized by Justice Schweitzer's order of April 22. Appellant has argued that the seizure was not authorized because the April 22 order "terminated automatically as soon as it had resulted in the interception of the first pertinent conversation" and this must have occurred prior to May 16. We disagree.

Affidavits in support of the order showed that the wiretaps previously authorized had provided evidence of extensive dealings in large quantities of heroin and cocaine by Stepenberg, Poeta, Martinez and Benitz. The District Attorney's affidavit points out the difficulties of securing evidence by normal investigative means in view of the manner of operations of the persons surveilled, their elusiveness, their frequent use of Spanish and their use of "narcotic jargon in an attempt to disguise the purpose of their transactions."

After stating that a 30-day period is required for eavesdropping the District Attorney's affidavits states that the authorization should *not* automatically terminate when communications of the nature described have first been obtained as it is believed that additional such communications will occur. In support of this, it is pointed out that meetings have been set up "which have proved to be spurious and are apparently made to avoid detection or disclose any possible police surveillance" and that "[t]he relationships of persons trafficking in narcotics are of a constantly changing nature."

Obviously the District Attorney and the police applied for an order which would allow for wiretapping for a full 30 days of all conversations relating to transactions in narcotics. Authority to seize only one conversation would have been wholly insufficient. In the order as signed, however, there was stricken out by typewritten "X" marks a provision which read

> ORDERED, that sufficient showing having been made in the application therefore the said effective period of authorized eavesdropping shall not and the same hereby is not to terminate when communications of the type particularly described herein are first obtained; and it is further

We are convinced that the typist meant to strike out only the paragraph following in the order form which was clearly not pertinent as if referred to "secret entry." That the typist struck out the "nontermination" paragraph inadvertently is indicated by the nature of the supporting affidavit, which we have described at length, and the fact that, in several places, the order speaks of "conversations" and

"communications." Moreover, the order further provided that

> ORDERED, that in order to minimize the interception of communications not otherwise subject to eavesdropping under law, the law enforcement agency herein designated shall, whenever possible, ascertain the hours of the day and the days of the week during which communications authorized herein to be intercepted are in fact made, and, upon ascertaining such hours and days, communications shall be intercepted only as such times; and it is further

This provision is entirely meaningless if the order is to be limited to one conversation and then automatically to expire upon the interception of the first conversation, as Poeta claims.[6]

As Chief Judge Mishler wrote, on February 5, 1971, in denying Poeta's motion to suppress these wiretap interceptions:

> The order of April 22, 1970, authorized the interception of "Conversations regarding the importation, sale, distribution, transportation, and whereabouts of cocaine and other narcotic drugs, the method of payment of such drugs and the recipients thereof." To interpret this authorization as limited to a conversation of the type sought is to unduly and unrealistically restrict the scope of the order. The affidavit in support of the order indicates the extensive and varied scope

[6] Rather than rely on the face of the order plus the application to support the inference that the "nontermination" paragraph had been inadvertently struck, the better practice would have been for the government to have called to testify the District Attorney seeking the order or the typist who made the order or even the judge who issued it.

> of defendant's illegal operations. The order, by its express terms, authorized more than seizure of a conversation. The authorization was expressed in language broad enough to permit the intercepted conversations recorded and sufficiently particularized to meet the standards of Berger v. State of New York, 388 U.S. 41, 87 S. Ct. 1873 (1967).

We hold that, even though the "nontermination" paragraph had been struck from the Schweitzer order, the order was in substantial compliance with the requirements of 18 U.S.C. § 2518(4)(e), which provides that every order shall state whether or not the interception "shall automatically terminate when the described communication has first been obtained," and that it allowed the interception of more than one conversation regarding narcotics smuggling. For these reasons we conclude that the May 16 interception was authorized and that, along with other statements in the affidavits of the District Attorney and Detective Reid, it furnished a sufficient basis for the Schweitzer order of May 21, 1970 and the later June 19 order.

Poeta's second argument, that the July 10 and 11 seizures were invalid because there was no present probable cause supporting the June 19th order, also must fail. The application for the June 19 order indicated that the defendants were planning to import narcotics into the country and that a wiretap was a necessary means of securing evidence of this fact. Supporting the District Attorney's application and relied upon to supply present probable cause for the June 19 order was the May 21 affidavit of Detective Reid which in turn relied upon information received in the May 16 interception. Based on this interception Detective Reid

stated that Poeta and Stepenberg received "a telegram . . . from Buenos Aires, Argentina stating that a shipment of narcotics is in the process of delivery but has been delayed temporarily." The incorporation of the affidavit into the application for the June 19 order indicates that the heroin shipment was still delayed, but also still expected. The reasonable belief that a shipment was expected was sufficient to supply the necessary present probable cause.

Appellant's third claim is that the July 10 and 11 intercepts should not have been received in evidence because the police had failed to minimize the quantity of material intercepted in the course of the taps. 18 U.S.C. 2518(5). However, this tap was on Stepenberg's telephone, not Poeta's. Poeta lacks standing to contest any such invasion of Stepenberg's rights. *E.g., Alderman* v. *United States,* 394 U.S. 165 (1969).

Poeta next claims that the intercepted conversations of July 10 and 11 were inadmissible as they occurred after the sealed indictment was returned on July 2, 1970 and thereby rendered the continued surveillance both unnecessary and a violation of his Sixth Amendment right to counsel. We disagree. The illegal activities of appellant and his co-conspirators did not cease with the filing of the sealed indictment. The propriety of continuing an investigation of criminal activities after one or more of the participants has been indicted is not open to question. *Massiah* v. *United States,* 377 U.S. 201, 207 (1963). Nor is there any basis for claiming violation of the Sixth Amendment right to counsel in the government's using a lawfully overheard conversation concerning continuing criminal conduct which was in no way elicited by a government agent or by

the police. Where criminal activities are continuing, as they were here, it is the duty of the government to attempt to secure evidence thereof regardless of whether any indictment has been returned against any participant in the continuing activities. *United States* v. *Edwards*, 366 F.2d 853, 873 (2d Cir. 1966).

Poeta's final claim is that the wiretap evidence should have been excluded because the New York police violated the statute, 18 U.S.C. § 2518(8)(a), by failing to make their recordings available to the court for sealing purposes immediately upon expiration of the last wiretap order which expired on August 19, 1970. We disagree. Apparently the recordings were not immediately sealed after the expiration of the taps because the police were under the impression that only the "issuing justice," N.Y.Crim.Proc. L. § 700.50(2), could direct the sealing. When the tap expired, the issuing justice, Justice Schweitzer, was on vacation. After a 13-day wait, the recordings were brought to another judge who directed that they be sealed.

The failure immediately to present the tapes to the issuing justice does not require their suppression. Section 2518(8)(a) provides that in the absence of a seal the tapes might be used in evidence if "a satisfactory explanation for the absence" is made. *A fortiorari*, where, as here, the tapes are sealed, a satisfactory explanation for the delay will allow their use in evidence. We are satisfied that the delay of the police in delivering the tapes for sealing was entirely excusable in the light of the wording of the New York statute. No claim is made that the tapes were altered or that the appellant was in any way prejudiced by the delay.

Affirmed.

Order of Affirmance

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-fourth day of January one thousand nine hundred and seventy-two.

Present:

HON. J. EDWARD LUMBARD,
HON. STERRY R. WATERMAN,
HON. WILFRED FEINBERG,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

LUIS STEPENBERG, et al.,
Defendants,

EDWARD POETA,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk

SUPREME COURT, U.S.
FILED
APR 29 1972
MICHAEL RODAK, JR., CLERK

No. 71-1146

In the Supreme Court of the United States

OCTOBER TERM, 1971

EDUARDO POETA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
HENRY E. PETERSEN,
Assistant Attorney General,
ROGER A. PAULEY,
RICHARD A. LEVIE,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Statement	2
Argument	6
Conclusion	11

CITATIONS

Cases:	
Alderman v. *United States*, 394 U.S. 165	10
Beatty v. *United States*, 389 U.S. 45	6
Berger v. *New York*, 388 U.S. 41	9
Chapman v. *California*, 386 U.S. 18	11
Harrington v. *California*, 395 U.S. 250	11
Hoffa v. *United States*, 385 U.S. 293	7
Massiah v. *United States*, 377 U.S. 201	6, 7
McLeod v. *Ohio*, 381 U.S. 356	6
United States v. *Boyd*, 446 F. 2d 1257	7
United States v. *Edwards*, 366 F. 2d 853	7
United States v. *Garcia*, 377 F. 2d 321, certiorari denied, 389 U.S. 991	7
United States v. *Missler*, 414 F. 2d 1293, certiorari denied, 397 U.S. 913	7
United States v. *Scott*, 331 F. Supp. 233	10

464-194 72—1

Statutes:

	Page
Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510 *et seq*	2, 7
18 U.S.C. 2516(2)	7
18 U.S.C. 2518	7
18 U.S.C. 2518(3)(c)	8
18 U.S.C. 2518(5)	8, 9, 10
21 U.S.C. (1964 ed.) 174	2
N.Y. Crim. Proc. Law, Art. 700	7
N.Y. Crim. Proc. Law § 700.40	9
Miscellaneous:	
1968 U.S. Code Cong. and Admin. News, 2112 (S. Rep. No. 1097, 90th Cong., 2d Sess.)	8

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 455 F. 2d 117.

JURISDICTION

The judgment of the court of appeals was entered on January 24, 1972. Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to March 8, 1972, and on that date the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the wiretap interception of the incriminating conversations between petitioner and a co-defendant, after indictment but before arraignment, vio-

lated petitioner's right to counsel and Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. 2510 *et seq.*).

2. Whether the renewal of the wiretap order, issued June 19, 1970, was invalid because of an alleged absence of a new showing of probable cause to support the warrant.

3. Whether one who was not the party upon whose telephone the wiretap was placed has standing, as to conversations to which he was not a party, to challenge the alleged failure of the police to minimize the quantity of material intercepted.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioner[1] was convicted of having illegally imported heroin (counts 1, 3, 5, 7, 9, 11, 13) (21 U.S.C. (1964 ed.) 174); having received, concealed and facilitated the transportation and concealment of heroin, knowing the same to have been illegally imported (counts 2, 4, 6, 8, 10, 12, 14) (21 U.S.C. 174); and of having conspired to violate 21 U.S.C. 174 (count 15). On March 19, 1971, petitioner was sentenced to concurrent terms of twenty years' imprisonment on each of the seven importation counts (1, 3, 5, 7, 9, 11, 13) and to concurrent prison terms of twenty years on each of the remaining counts, the latter sentences to run consecutively to those imposed under the importation counts. In addition, petitioner was fined $20,000 on each of the fifteen counts on

[1] Petitioner was tried and convicted with his co-defendant, Luis Stepenberg, who died prior to sentencing.

which he was convicted. The court of appeals affirmed (Pet. App. A. 1–11).

1. The evidence, which, for purposes of appeal, petitioner does not dispute, shows that in December 1968 one Jaime Cohen, who subsequently became a government informant, met with co-defendant Stepenberg in Brazil and there agreed to assist in transporting heroin into the United States (Tr. 310–311). Upon his return to the United States, Cohen met with petitioner and, pursuant to Stepenberg's instructions, rented a house in Forest Hills, New York (Tr. 319–323, 328–329). Cohen was told by Stepenberg that petitioner was in charge of the house, that Cohen should take all instructions regarding heroin dealings from petitioner, and that Cohen should never go to the house without specific instructions to do so from petitioner (Tr. 328–330, 338). On at least seven different occasions between June 1969 and February 1970, Cohen, acting on petitioner's instructions, went to the Forest Hills house and picked up heroin which had been imported into the country and deposited in the house. The standard procedure was for petitioner to telephone Cohen and tell him when to go to the house and inform him of the specific location of the heroin within the house. After picking up the heroin Cohen would contact a purchaser, make the sale and then advise petitioner, who would arrange to pick up the money (Tr. 340–347, 349–353, 362–365, 368–370, 383–386, 391–402, 403–406). By the time of his arrest in February 1970 Cohen had sold approximately 20½ kilos of heroin for more than $290,000 (Tr. 346, 352, 364, 370, 385, 397, 400, 402, 407).

2. Following his arrest Cohen agreed to assist local and federal law enforcement officials. In this capacity Cohen, pursuant to an instruction from Stepenberg, met petitioner on May 15, 1970, and told him that he had customers ready to purchase at least ten kilos of heroin (Tr. 494–495). Petitioner assured Cohen that the heroin was of good quality and was coming from France (Tr. 495). At a subsequent meeting later that day petitioner again told Cohen that the heroin was expected at any time and that Cohen would be notified as soon as the shipment arrived (Tr. 496). On May 20, when petitioner and Cohen met again, petitioner stated that the heroin was coming soon, warned Cohen to be careful to avoid police surveillance and instructed Cohen to avoid using the telephone (Tr. 498–500). The following day another meeting between petitioner and Cohen took place at which petitioner explained that, although the heroin was coming from France, there had been some delay and that he was uncertain whether the heroin would enter the United States through Canada or South America (Tr. 501–503).[2]

3. In addition to Cohen's testimony, Felix Martinez, who purchased heroin from Cohen on six occasions from June 1969 to January 1970, testified that he met with Cohen and petitioner in August 1969, at which time Cohen told Martinez to notify petitioner if anything happened to Cohen (Tr. 1540–1541). Sub-

[2] All of the meetings between Cohen and petitioner in May 1970 were observed and filmed by local and federal agents (Tr. 1219–1231, 1249–1250, 1251–1256).

sequently, Martinez accompanied Cohen to the Forest Hills house and there met petitioner who was carrying two kilos of heroin, which Cohen then gave to Martinez. At this meeting Martinez complained to petitioner about the quality of some heroin purchased earlier and petitioner insisted the quality was good (Tr. 1542–1545). Martinez met petitioner again in February 1970 and told him Cohen was in jail and needed bail money, but petitioner indicated he could do nothing to help Cohen for 60 days (Tr. 1547–1550).

4. After agreeing to cooperate with the police, Cohen consented to the placement of a wiretap on his telephone; the tap was subsequently installed pursuant to an order of a Justice of the New York Supreme Court on March 19, 1970 (A. App. 45a–48a, 59a).[3] As a result of information obtained from the tap on Cohen's telephone, an order was obtained from Mr. Justice Schweitzer of the same court on April 22, 1970, authorizing a wiretap on the telephone of Stepenberg's father, on the allegation that Stepenberg used this telephone (A. App. 30a–33a, 42a–43a). This order was amended on May 7, 1970, to permit the tapping of a telephone which Stepenberg had installed in his own apartment. The tap on Stepenberg's phone was reauthorized by subsequent orders of Mr. Justice Schweitzer on May 21, 1970, June 19, 1970, and July 20, 1970 (A. App. 77a–80a; 90a–93a; 100a–103a). On July 2, 1970, an indictment against peti-

[3] "A. App." refers to Appellant's [petitioner's] Appendix filed in the court below, a copy of which is being lodged with the Clerk of this Court.

tioner and Stepenberg was returned and ordered sealed. Although bench warrants for the indictees were issued at that time, execution of the warrants was delayed because the police had learned that a shipment of sixty kilos of heroin was scheduled to arrive in New York within a week or ten days (Tr. 1373–1374).

While acting pursuant to the order of June 19 the police intercepted conversations between petitioner and Stepenberg on July 10 and 11, 1970. On July 10, petitioner telephoned Stepenberg, said he was being followed, and warned Stepenberg to "desist." On the next day petitioner called Stepenberg and, using code language, discussed the expected arrival of a shipment of heroin (Tr. 1706–1713). Although he advances different grounds, petitioner's sole contention here is that his conversations of July 10 and 11 with Stepenberg were improperly admitted into evidence.

ARGUMENT

1.a. Relying on *Massiah* v. *United States*, 377 U.S. 201, *McLeod* v. *Ohio*, 381 U.S. 356, and *Beatty* v. *United States*, 389 U.S. 45, petitioner contends that, once the indictment against himself and Stepenberg had been returned, the government was required to terminate the wiretap, and that the continuation of the wiretap on Stepenberg's telephone, resulting in the interception of the conversations of July 10 and 11, violated his right to counsel. There is, however, a critical distinction between the cases relied upon by petitioner and the facts here. In *Massiah*, *McLeod* and *Beatty* the incriminating statements related to the crime charged in the indictment; here, by contrast,

conversations between petitioner and Stepenberg dealt solely with an expected shipment of narcotics and did not relate to the charges contained in the indictment, which covered only the period of June 1969–February 1970.[4] Where, as here, the intercepted post-indictment statements related to present and future criminal conduct, the rationale of *Massiah* and subsequent cases does not require exclusion of the seized conversations. See *United States* v. *Garcia*, 377 F. 2d 321, 324 (C.A. 2), certiorari denied, 389 U.S. 991; cf. *Hoffa* v. *United States*, 385 U.S. 293, 309–310; *United States* v. *Missler*, 414 F. 2d 1293, 1302 (C.A. 4), certiorari denied, 397 U.S. 913. As this Court recognized in *Massiah*, it is often proper to continue an investigation of criminal activities of an individual, even though an indictment has been returned against him. 377 U.S. at 207; see also *United States* v. *Edwards*, 366 F. 2d 853, 873 (C.A. 2). This is especially applicable in the instant circumstances where petitioner was actively engaged in the process of importing heroin into the country and was awaiting its imminent arrival.

1.b. Petitioner contends that the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. 2510 *et seq.*)[5] does not permit a continuation of the wiretap after an indictment is returned against those whose conversations are sought to be intercepted. Al-

[4] The conversations were properly introduced as examples of subsequent similar conduct used to show intent, design and scheme. *United States* v. *Boyd*, 446 F. 2d 1267, 1270–1271 (C.A. 5), and cases cited therein.

[5] The wiretap warrants were sought and issued under N.Y. Crim. Proc. Law Art. 700. However, as the parties have recognized throughout this proceeding, 18 U.S.C. 2516(2) requires that the state court warrants comply with 18 U.S.C. 2518.

though we agree with petitioner that the statute requires, *inter alia*, a showing of necessity for use of a wiretap (18 U.S.C. 2518(3)(c)), the necessity for the employment of the tap in this case was sufficiently shown. Furthermore, although the statute requires that a wiretap must terminate upon "attainment of the authorized objective" (18 U.S.C. 2518(5)),[6] Congress, in enacting this provision, recognized that each case must be analyzed on its own facts. See 1968 U.S. Code Cong. and Admin. News, 2112, 2192 (S. Rep. No. 1097, 90th Cong., 2d Sess.).

It is clear that the continued use of the tap was not intended to supply additional evidence to substantiate the indictment, which covered only the period of June 1969–February 1970, but sought to secure information relating to an expected shipment of narcotics. In seeking the order of June 19, 1970, which authorized the tap pursuant to which the July conversations were intercepted, the District Attorney for Queens County stated that conversations intercepted under the original wiretap order revealed that petitioner and Stepenberg expected a shipment of narcotics from Argentina, and that the shipment had been temporarily delayed (A. App. 87a–89a, 94a–98a). Thus, terminating the tap upon the return of the indictment in this case would have frustrated a legitimate police investigation of continuing criminal conduct, extending beyond the charges in the indictment.

2. Petitioner contends further that the June 19 intercept order was improperly issued because there

[6] In granting the order for a thirty-day period Mr. Justice Schweitzer provided that the tap need not "terminate when communications of the type particularly described * * * are first obtained * * *." (A. App. 92a–93a).

was no new showing of probable cause, as required by the statute (N.Y. Crim. Proc. Law § 700.40; 18 U.S.C. 2518(5)), for extension of the wiretap authorization. See *Berger* v. *New York*, 388 U.S. 41, 59. Petitioner argues that the application for the June 19 order contained no new or additional facts which had not been contained in the application for the order of May 21, 1970. No objection on this ground was made in the trial court. Petitioner does not contend here that no probable cause existed to support the June 19 order, but rather that, as a matter of law, the initial factual basis for the issuance of the warrant cannot provide the basis for its renewal thirty days later.

Although we do not believe new facts necessarily are required to be adduced in support of a showing of probable cause for an extension order, in this case such a showing was in fact made. The application for the June 19 order incorporated the May 21 affidavit of Detective Reid which related information, based on an intereception of May 16, 1970, that an expected shipment of narcotics had been delayed temporarily. The incorporation of Reid's affidavit, originally submitted in connection with the application for the May 21 order, "indicate[d] that the heroin shipment was still delayed, but also still expected. The reasonable belief that a shipment was expected was sufficient to supply the necessary present probable cause" (Pet. App. A 10).

Moreover, the affidavit in support of the order of June 19 (A. App. 94a–99a) did in fact refer to conversations overheard during the course of the wiretapping authorized by the previous order, at least one

of which (between Stepenberg and an accomplice) was introduced at trial (Tr. 1676).

3. Petitioner contends (Pet. 9–10) that the court of appeals misread *Alderman* v. *United States*, 394 U.S. 165, 176, in determining that he lacked standing to challenge the failure of the police to minimize the quantity of material intercepted in the course of the wiretap on Stepenberg's telephone (18 U.S.C. 2518 (5)). Petitioner, of course, had standing to challenge those conversations to which he was a party or which occurred on his premises (*Alderman*, *supra*, 394 U.S. at 176). But where, as here, the wiretap was directed against another and the claim is not that there was a "failure to minimize" the quantity of material intercepted from petitioner, but rather that there was unnecessary interception of conversations of another, the court of appeals correctly concluded that he lacked standing to challenge the alleged failure to minimize the interception of those conversations (Pet. App. A. 10; 394 U.S. at 173–174).

With respect to the conversations of July 10 and 11 there was no evidence that the police did not comply with the statute by failing to minimize the interception of the conversations between petitioner and Stepenberg on those dates. The conversations involved a code language, were in Spanish, dealt with narcotics and, to one unfamiliar with the code, would appear to be innocent. In such a situation the police were justified in monitoring the entire conversations.[7]

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[7] Judge Waddy in *United States* v. *Scott*, 331 F. Supp. 233, 247 (D. D.C.), relied upon by petitioner in the court below, indicated "that it may be reasonable to monitor an entire conversation between two known conspirators even if that conversation turns out to be innocent."

We point out that, in addition to all the preceding arguments, even if the conversations of July 10 and 11 should have been excluded, any error in their admission was harmless beyond a reasonable doubt in view of the overwhelming evidence of petitioner's guilt. *Chapman* v. *California*, 386 U.S. 18; *Harrington* v. *California*, 395 U.S. 250.* Completely independent of the seized conversations the jury had before it the evidence, set forth in the Statement, showing petitoner's involvement in the business of importing and distributing heroin as charged in the indictment. In view of this evidence, the wiretap evidence, limited as it was to two conversations occurring several months after the time period covered by the indictment, can not be said to have prejudiced the petitioner.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

HENRY E. PETERSEN,
Assistant Attorney General.

ROGER A. PAULEY,
RICHARD A. LEVIE,
Attorneys.

APRIL 1972.

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* The question of whether the error would be harmless as to Stepenberg is not presented since Stepenberg died prior to sentencing (note 1, *supra*).

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